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No. 09-1204

IN THE

Supreme Court of the United States

CITY OF MILWAUKEE POST NO. 2874
VETERANS OF FOREIGN WARS OF THE UNITED STATES,
Petitioner,

v.

REDEVELOPMENT AUTHORITY OF THE
CITY OF MILWAUKEE,
Respondent.

On Petition for a Writ of Certiorari to the Wisconsin Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION RESTATED

Whether the Wisconsin Supreme Court, applying the "unit rule" of valuation, which has never been held to violate the federal Constitution, properly refused to recognize as a matter of state constitutional law an exception to the rule in the atypical circumstances of this case?

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BRIEF FOR RESPONDENT IN OPPOSITION

This case involves the condemnation in the City of Milwaukee of a residential hotel that had been substantially unoccupied for seven years and was riddled with building code violations. Following established Wisconsin law, a state trial court entered judgment on a jury verdict determining the fair market value of the property to be $0. The Wisconsin Supreme Court upheld this decision, rejecting the argument that this determination "contravene[s] [the] *state* constitutional right to just compensation" of petitioner, a lessee who held a leasehold interest in the property. Pet. App. 3 (emphasis added). In so ruling, the court reaffirmed and applied the "unit

rule," a well-established valuation principle in Wisconsin constitutional and statutory law whereby property is valued in eminent domain as an undivided fee simple and this value is then apportioned among multiple owners in accordance with their respective interests. *See, e.g.*, Wis. Stat. §§ 32.05(7)(a), 32.05(9)(a)(1), 32.09(5)(a).

Petitioner has responded to the state supreme court's decision by presenting to this Court a *federal* question that was neither pressed nor passed on in the case below. In these circumstances, even apart from the absence of the traditional criteria for granting certiorari—in particular, the lack here of a federal constitutional conflict in the courts below—review is inappropriate: the Court lacks jurisdiction under 28 U.S.C. § 1257.

COUNTERSTATEMENT OF THE CASE

The fact-driven nature of this controversy and petitioner's incomplete and inaccurate statement of the case require this counterstatement of the case. In order to place the petition in context, it is necessary to set forth a brief description of (1) the property and the lease, (2) the condemnation proceedings, and (3) the appellate decisions.

1. Property and Lease. Petitioner, a branch of the Veterans of Foreign Wars ("VFW"), was a long-time tenant in a building located on the near west side of Milwaukee: viz., at 2601 West Wisconsin Avenue (the "Building"). Pet. App. 9. This tenancy derived from a business deal transacted decades ago: In 1961, petitioner sold its building on the site (the Best Mansion) and the underlying property to Towne Metropolitan, Inc. *Id.* In exchange, petitioner received a 99-year lease on 5,250 square feet on the

ground floor of the 11-story hotel that was to be constructed on the site. *Id.* Petitioner negotiated rent of $1 year, with the lessor to pay all taxes, heating, air conditioning, and maintenance. Pet. App. 9-10. Petitioner also negotiated for the option of renewing its lease for a further 99 years. Pet. App. 10.

Although this lease obviously contained terms very favorable to petitioner, it did not include other provisions that one would expect to find in a long-term commercial lease containing these terms. For example, petitioner agreed that its lease was subordinate to the building owner's mortgage, with the result that the lease could be eliminated upon default and foreclosure on the mortgage. Resp. App. 6a.[1] Likewise, petitioner failed to insist that the owner maintain insurance on the Building, thereby creating the risk that the lease would be rendered valueless if the Building were destroyed by fire or other casualty. *Id.* And, of greatest consequence as the future would unfold, petitioner did not negotiate a condemnation clause that would protect the value of its interest in the event that the Building were taken by eminent domain and the lease automatically terminated. *See* Pet. App. 10; Resp. App. 6a.

The new owner proceeded to build the hotel on the site, with petitioner (pursuant to the lease) enjoying a small portion of square footage on the ground floor. Pet. App. 9. Over the years, ownership of the Building changed hands several times. Pet. App. 10. Each

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[1] Although petitioner does not include the lease in its submission in this Court, it can be found in the record and is reproduced in the Appendix to this Brief in Opposition (Resp. App. 1a-9a).

successive owner honored the lease, providing petitioner effectively cost-free space for over 40 years. *Id.* By 1994, the Maharishi Vedic University was the owner of the Building, but it was never able to take occupancy. *Id.* The condition of the Building had deteriorated to the point where significant code violations existed. Pet. App. 10-12. The City of Milwaukee therefore could not issue occupancy permits for the Building. Pet. App. 11-12.

2. Condemnation Proceedings. In light of the deteriorated condition of the Building and the neighborhood, respondent Redevelopment Authority of the City of Milwaukee ("Redevelopment Authority"), acting pursuant to the state's Blighted Area Law, Wis. Stat. §§ 66.1331 and 66.1333, publicly suggested in 1998 that a redevelopment district be created, encompassing the Building. Pet. App. 10-11. The next year, respondent created the redevelopment district, issued a relocation order setting forth a relocation plan, and identified three comparable properties for petitioner. Pet. App. 10-11, 56.

Consistently with Wis. Stat. § 32.05, the Redevelopment Authority made a jurisdictional offer of $440,000 to purchase the property—$300,000 for the Building in which petitioner was the tenant, and $140,000 for the personal property of the owner (Maharishi Vedic University) and the adjacent parking lot of Maharishi Vedic in which petitioner had no leasehold or other interest. Pet. App. 11. A separate apportionment proceeding under Wis. Stat. § 32.05(7)(d) was held to determine the apportionment of the $300,000 payment for the Building. Based on the favorable terms of the lease, the Milwaukee County Circuit Court (No. 01-CV-1802) apportioned the entire $300,000 payment (less taxes)

for the Building to petitioner as lessee. Pet. App. 12. The Maharishi Vedic received only the $140,000 (less taxes) for its personal property and the adjacent parking lot. *Id.*

Petitioner obtained and deposited in its bank account its apportioned share of the Redevelopment Authority's $300,000 payment for the Building. Pet. App. 12.[2] Petitioner then elected to challenge the $300,000 award by appealing the issue of the Building's value to the Milwaukee County Condemnation Commission. *Id.* Petitioner requested that the unit rule not be applied before the Condemnation Commission, and the Commission asked the Milwaukee County Circuit Court (No. 02-CV-1711) for a ruling. The circuit court ordered the Condemnation Commission to value the property under Wis. Stat. §32.09(5)(a), consistently with Wisconsin's unit rule. Pet. App. 12.

Petitioner persuaded the Wisconsin Court of Appeals to grant interlocutory review of the circuit court's order requiring application of the unit rule. Pet. App. 98. The court of appeals affirmed the holding that Wisconsin precedent required that the unit rule be applied to value the Building. Pet. App. 102. Petitioner did not seek further review of this decision by the Wisconsin Supreme Court.

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[2] In February 2001, petitioner filed a separate suit challenging the right of the Redevelopment Authority to condemn the land. The circuit court granted summary judgment to the Redevelopment Authority and was affirmed by the Wisconsin Court of Appeals. *See City of Milwaukee Post No. 2874 VFW v. Redevelopment Authority of Milwaukee*, 2002 WI App. 85, 252 Wis. 2d 768, 642 N.W.2d 646 (unpublished opinion).

Petitioner meanwhile remained in the Building, which the City of Milwaukee deemed unfit for human occupancy.[3] Pet. App. 12 n.8. Because of its dangerous condition, the City of Milwaukee ordered the building razed, which order petitioner challenged by separate action in the circuit court, in March 2003. *Id.* Agreeing that the Building was not fit for human occupancy, the court issued the order. Pet. App. 100. The building was razed. *Id.* At present, the land has been cleared of all structures and is vacant. Pet. App. 12 n.8.

Following the court of appeals' disposition of the interlocutory review challenging the use of the unit rule, the case returned to the Milwaukee County Condemnation Commission under the supervision of the Milwaukee County Circuit Court. In these early prehearing proceedings, petitioner filed a notice of motion to reconsider use of the unit rule, citing, in the four-sentence body of the document, state and federal constitutional grounds. Pet. App. 113-114. In its briefs and argument, however, petitioner sought only a determination that application of the unit rule violated the Wisconsin Constitution. The circuit court denied the motion. The case proceeded to determination before the Condemnation Commission.

After hearings and testimony (including testimony by petitioner about the value of its lease), the Con-

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[3] In 2003, petitioner filed a motion for statutory relocation benefits under Wis. Stat. § 32.20. Petitioner argued that it was entitled to "comparable replacement property," which it estimated, upon factoring in the cost of acquiring a site and constructing a new building, to be $1.2 million. *See City of Milwaukee Post 2874 VFW v. Redevelopment Authority of Milwaukee*, 2006 WI App. 56, 290 Wis. 2d 510, 712 N.W.2d 86 (unpublished opinion). The Wisconsin Circuit Court (No. 03-CV-9524) denied the request, which also was denied on appeal. *Id.*

demnation Commission decided that respondent should pay an award of $285,000 for the Building (which was $15,000 less than the $300,000 that the Redevelopment Authority had awarded for the Building). Pet. App. 12-13. Petitioner filed a case in the circuit court to appeal this award, and thus began the lower court case which gave rise to the Wisconsin Supreme Court decision at issue here.

In this newly filed and numbered case (No. 05-CV-365), petitioner again challenged the constitutionality of the unit rule as a matter of state law. Petitioner briefed only whether application of the unit rule would violate the Wisconsin Constitution (viz., Art. I, § 13). Pet. App. 13-14. The circuit court concluded that the unit rule was constitutional and should be applied to this case. Pet. App. 14.

Petitioner and respondent tried before a jury the issue of the fair market value of the Building. *Id.* They submitted competing evidence. Pet. App. 15. Petitioner's appraisal expert testified that the property could be renovated and used for "general residential" purposes. Pet. App. 16. Although petitioner's expert could not testify that the suggested use was "financially feasible," he nonetheless assigned value to the Building. *Id.* By contrast, respondent's appraiser testified that "the cost of remodeling the building to make it usable [including substantial asbestos removal] would be more than the fair market value of the building and land." Pet. App. 7-8. He further concluded that "the value of the land in an undeveloped state is exceeded by the cost of demolishing the building to render the land vacant." Pet. App. 8.

The jury determined that "the undivided interest in the property condemned in the present case by the

Redevelopment Authority had no value at the time of the taking." Pet. App. 5.[4] Accordingly, the circuit court determined that "the VFW is not entitled to receive any compensation from the Redevelopment Authority and must reimburse the Redevelopment Authority for money paid to it." Pet. App. 6.

3. State Appellate Proceedings. Petitioner appealed the circuit court's decision to the Wisconsin Court of Appeals. Petitioner's statement of issues in its brief to the Wisconsin Court of Appeals challenged the constitutionality of the award under the Wisconsin Constitution:

> Is application of the "unit rule" prohibiting the VFW from proving and recovering the value of its lease, which was terminated by condemnation, a violation of Sec. 13, Article I of the Wisconsin Constitution?

Brief and Appendix of Plaintiff-Appellant, at 1, Wis. Ct. App. (Mar. 2, 2007). Consistently with the stated issue, petitioner's brief argued against application of the unit rule on the ground that it violates the just-compensation provision of Article I, Section 13 of the Wisconsin Constitution. Respondent correspondingly countered with arguments under the state constitution.

The Wisconsin Court of Appeals ruled for petitioner in what the Wisconsin Supreme Court would call a decision based on "public policy." Pet. App. 24. The

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[4] The special verdict question read as follows: "What was the fair market value of the entire property located at 2601 West Wisconsin Avenue, in the City and County of Milwaukee, as a whole unit and single entity, with all its square footage, on February 28, 2001, in the condition of the property on that date?" Pet. App. 17. The jury's response was "$0." *Id.*

Wisconsin Court of Appeals concluded that, in the "particular circumstances" of this case, an exception to the unit rule was required. Pet. App. 87. In reaching its decision, the Wisconsin Court of Appeals analyzed in detail Wisconsin's unit-rule decisions and made passing reference to federal cases. Pet. App. 85-96.

The Wisconsin Supreme Court granted respondent's petition for review. It explained the "issue on review" as the constitutionality of compensation as determined under state law:

> If the VFW, which holds a long-term favorable lease, receives no compensation for its leasehold interest under the unit rule, has the VFW's right to just compensation under Article I, Section 13 of the Wisconsin Constitution, been violated?

Pet. App. 6-7. This was the focus of the parties: debating lawfulness of the award under the Wisconsin Constitution. Petitioner did not pursue a takings claim under the United States Constitution.

The Wisconsin Supreme Court reversed the court of appeals and reinstated the judgment of the circuit court. The Wisconsin Supreme Court held that "the unit rule of the circuit court applied in the present case does not contravene the VFW's *state* constitutional right to just compensation." Pet. App. 3 (emphasis added). As thus expressly discussed in the majority opinion, and as the petition itself points out, the Wisconsin Supreme Court's decision was the product of adherence to "Wisconsin's precedent." Pet. 1.

In addition to defending the unit rule, respondent argued in the proceedings below that petitioner's challenge was barred by the law of the case, claim

and issue preclusion, waiver, and due process, because the Wisconsin Court of Appeals, in the earlier interlocutory review proceeding which petitioner did not appeal to the Wisconsin Supreme Court, had upheld application of the unit rule. Pet. App. 3-4 n. 2. Because it ruled for respondent on state constitutional grounds, the Wisconsin Supreme Court did not reach these issues. *Id.*

REASONS FOR DENYING THE PETITION

Petitioner would have this Court upset the Wisconsin Supreme Court's application of an established state-law rule, in order that respondent might award petitioner something for its lease. But this Court is not charged with intervening in state law to right alleged wrongs. This is so here as a matter of law under 28 U.S.C. § 1257. It may well be so as a matter of prudence also: the alleged wrong hinges on factual determinations involving the application of settled principles of state just-compensation law to the highly atypical circumstances of this case. This Court does not sit to second-guess state courts as to when it is appropriate to recognize an exception to general principles grounded in state law. This is especially true in a controversy that has already generated five opinions by state appeals courts.

In any event, the "unit rule" or the "undivided fee rule" does not produce a result contrary to federal law or, as applied by the states with inevitable variations under state law, generate a conflict in federal constitutional law, warranting this Court's review. The Court should decline petitioner's invitation to transform a reasonably well-settled body of state law into federal law and to infer a federal constitutional law conflict where one does not exist.

I. THE WISCONSIN SUPREME COURT HAVING NOT PASSED UPON A FEDERAL QUESTION AND PETITIONER NOT HAVING PRESSED ONE, THIS COURT LACKS JURISDICTION UNDER 28 U.S.C. §1257(a).

The Wisconsin Supreme Court's decision resolves issues of Wisconsin law. This is scarcely surprising: petitioner pressed no federal question to the state supreme court. In these circumstances, petitioner cannot satisfy the jurisdictional requirements of 28 U.S.C. § 1257(a), and the Court should deny the petition for certiorari. *Cf.* Sup. Ct. R. 14(g).

A. The Wisconsin Supreme Court Did Not Resolve a Question of Federal Right.

The Wisconsin Supreme Court rendered its decision under Wisconsin law. This is clear from its holding: "We conclude that the unit rule the circuit court applied in the present case does not contravene the VFW's state constitutional right to just compensation." Pet. App. 3; *accord* Pet. App. 6, 13, 18, 20.

It is clear otherwise as well from the court's opinion. The Wisconsin Supreme Court opened its analysis with Article I, Section 13 of the Wisconsin Constitution: "Article I, Section 13 of the Wisconsin Constitution provides in full that '[t]he property of no person shall be taken for public use without just compensation therefor.'" Pet. App. 18 (quoting Wis. Const., Art. I, § 13). The bulk of the subsequent legal analysis in the opinion focuses upon the court's comprehensive review of Wisconsin cases applying the unit rule, the acceptance of which, the Wisconsin Supreme Court has elsewhere noted, "is beyond ques-

tion in Wisconsin jurisprudence." *Green Bay Broadcasting Co. v. Redevelopment Authority of Green Bay*, 116 Wis. 2d 1, 11-12, 342 N.W.2d 27, 32 (1983), as modified by, 119 Wis. 2d 251, 349 N.W.2d 478 (1984). The Wisconsin Supreme Court thus followed Wisconsin precedent and upheld the unit rule as an appropriate basis for valuing the Building under the circumstances of this case, rejecting petitioner's argument "that this Court must make an exception to the unit rule in the present case in order to avoid a grossly unjust rule." Pet. App. 23.

To be sure, Article I, Section 13 of the Wisconsin Constitution closely resembles the Fifth Amendment of the United States Constitution ("nor shall private property be taken for public use without just compensation"). For this reason, the Wisconsin Supreme Court made passing reference to some of this Court's cases. *See* Pet. App. 18, 20 nn.18-20. The Wisconsin Supreme Court mentioned *Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189 (1910), as part of its analysis of the direction Wisconsin cases have taken, *see* Pet. App. 40-41 n.53, just as treatises and law review articles were explored in the opinion.[5]

But even the dissent, upon which petitioner relies heavily, acknowledges that the issue decided by the Wisconsin Supreme Court is one of Wisconsin law.

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[5] In these circumstances, this situation cannot be considered one where state law is "interwoven" with federal law. *See Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983). The Wisconsin Supreme Court did not rely upon federal law except "as it would rely upon the precedents of all other jurisdictions." *Id.* at 1041. *See* Pet. App. 19 ("Accordingly, when interpreting and applying Article I, Section 13 of the Wisconsin Constitution, this court long has sought guidance in decisions based on the federal Takings Clause or on analogues in the constitutions of other states.").

The dissent recognizes that the unit rule is Wisconsin state law. *See, e.g.*, Pet. App. 63, 70 & n.11, 72. What the dissent regrets is the court's failure to hold that an exception should arise *under state law*, given what the dissent terms the "unusual" circumstances or "extreme facts" of this case. Pet. App. 55, 72; *see also id.* at 54 (recognizing that an exception to the unit rule under Wisconsin law was at issue). Thus, in advocating for an exception here, the dissent looked to other exceptions that have arisen in Wisconsin's jurisprudence under the rule. *See* Pet. App. 63-72 (citing *Luber v. Milwaukee County*, 47 Wis. 2d 271, 177 N.W.2d 380 (1970); *Maxey v. Redevelopment Authority*, 94 Wis. 2d 375, 288 N.W. 2d 794 (1980); *Redevelopment Authority of Green Bay v. Bee Frank, Inc.*, 120 Wis. 2d 402, 355 N.W.2d 240 (1984)).

B. Petitioner Did Not Press a Federal Question for Decision.

Nor did petitioner present a federal takings (or other federal) question before the Wisconsin Supreme Court. Petitioner thus cannot establish that it raised a federal question with "fair precision and in due time," *Adams v. Robertson*, 520 U.S. 83, 88 (1997), or explain when, "both in the court of first instance and in the appellate courts," Sup. Ct. R. 14(g)(i), that question was raised.

Throughout this case, petitioner has affirmatively brought its case under Wisconsin state law. In its pretrial submissions to the circuit court in the case below challenging the award of the Condemnation Commission, petitioner argued only that the unit rule violated Article I, Section 13 of the Wisconsin Constitution. Pet. App. 3. It proceeded similarly in the Wisconsin Court of Appeals and the Wisconsin Supreme Court.

Such an approach is not surprising, since eminent domain law is a state law issue arising as a matter of state sovereignty. *See City of Cincinnati v. Louisville & Nashville Railroad Co.*, 223 U.S. 390, 400 (1912); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 26 (1959). Over the years, the states, consistently with their own bodies of state law, have decided the appropriate way to value property in the circumstances of eminent domain. Some states use juries to determine just compensation; others do not. *See* 5 *Nichols on Eminent Domain*, §§ 17.1[1], 17.1[2] (3d ed. 2007). Some states reduce awards for offsetting benefits in partial-takings cases; others do not. *See* 3 *Nichols on Eminent Domain*, §§ 8A.02-8A.03. Some states make broad provision for relocation benefits that "track" federal law; others make provision for specific benefits that exceed federal law. *See* 6A *Nichols on Eminent Domain*, §§ 34.05[2], 34.07.

Against all this, petitioner offers this as evidence in support of its claim of a "federal" question in the record: In a separate case, before the question of compensation was referred to the Condemnation Commission, petitioner filed a notice of motion with the circuit court seeking "a determination that the application of the unit rule violates the just compensation provisions of §13, Article I, Wis. Const. and the Fifth and Fourteenth Amendment of the United States Constitution" (Pet. App. 114). However, in its briefs filed in support of the motion and in its argument on the motion, petitioner only sought a ruling that use of the unit rule violated the just compensation provision of Article I, Section 13 of the Wisconsin Constitution. The notice of motion stands—with petitioner not pressing or even acting upon the federal argument—as the sole paper of petitioner asserting a

federal claim before the filing of the petition for certiorari with this Court, even though the litigation has proceeded for over 10 years.

Petitioner's failure to "specially set up and clai[m]" a federal right in the courts below forecloses its access to this Court. 28 U.S.C. § 1257(a). Only in "rare" circumstances will the Court hear an issue that was not presented or decided in the state court. *See Yee v. City of Escondido*, 503 U.S. 519, 533 (1992). This case does not present any circumstance justifying a departure from this rule.[6]

II. PETITIONER HAS PRESENTED NO CONFLICT UNDER FEDERAL CONSTITUTIONAL LAW.

Even if the Court somehow concludes that 28 U.S.C. § 1257's requirements are met, the Court should not intercede where—even now—petitioner cannot

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[6] In fact, before the Wisconsin Supreme Court, it was respondent that defensively argued that "due process, law of the case, claim and issue preclusion, and waiver" were further reasons that petitioner should not prevail. Pet. App. 3-4 n.2. As this Court explained in *Adams*, 520 U.S. at 89, petitioner cannot rely upon respondent's discussion of a federal issue to satisfy the requirement that petitioner have raised a federal issue. That is particularly so here, where petitioner did not join issue on those points in its response and where the Wisconsin Supreme Court expressly stated it "need not address additional issues that the [respondent] Redevelopment Authority raises in its briefs to this court in support of its position that the court of appeals erred in reversing the circuit court's judgment." Pet. App. 3-4 n.2. (Of course, those grounds for review would arise again if the case were to be sent back to the Wisconsin Supreme Court because of any action by this Court.) In the end, the Wisconsin Supreme Court rendered its decision based on its interpretation of Wisconsin law and the acceptance of the unit rule in Wisconsin law.

show a *federal* law conflict involving the unit rule. The point is not that state courts apply identical versions of the unit rule in state eminent domain valuation proceedings. It rather is that petitioner has failed to adduce a single case in which any court has decided that application of the rule is unconstitutional *as a matter of federal constitutional law*. In short, there is no conflict warranting this Court's intervention; indeed, there is not even an adequately developed body of federal law.

To begin, the predominant rule of eminent domain valuation followed by the state courts is the unit rule. As the Wisconsin Supreme Court noted, "the unit rule is accepted in the majority of American jurisdictions." Pet. App. 22. Wisconsin's application of the rule is consistent with that of the highest courts of many other states, including those of Alabama, Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, New Jersey, New York, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, and West Virginia.[7] *See* Pet. App. 26-28 n.32, 31 n.38, 36 n.47,

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[7] *See, e.g., Harco Drug, Inc. v. Notsla, Inc.*, 382 So. 2d 1, 5-6 (Ala. 1980); *National Advertising Co. v. State*, 611 So. 2d 566, 569 (Fla. 1993); *City & County of Honolulu v. Market Place*, 517 P.2d 7, 12-14 (Haw. 1973); *City of Chicago v. Anthony*, 554 N.E.2d 1381, 1384 (Ill. 1990); *J.J. Newberry Co. v. City of East Chicago*, 441 N.E.2d 39, 43 (Ind. Ct. App. 1982); *In re Kansas Turnpike Project*, 317 P.2d 384, 389 (1957)); *Commonwealth v. Sherrod*, 367 S.W.2d 844, 849 (Ky. 1963), *State v. D&J Realty Co.*, 229 So. 2d 344, 347 (La. 1969); *Cornell-Andrews Smelting Co. v. Boston & Providence R.R. Corp.*, 95 N.E. 887, 889 (Mass. 1911); *Michigan State Highway Comm'r v. Woodman*, 115 N.W.2d 90, 92-93 (Mich. 1962); *County of Hennepin v. Holt*, 207 N.W.2d 723, 727 (Minn. 1973); *Lennep v. Mississippi State Highway Comm'n*, 347 So. 2d 341, 343 (Miss. 1977); *New Jersey Sports Exposition Authority v. East Rutherford*, 348 A.2d 825,

47-48 nn.71-72. Wisconsin's approach is consistent, as well, with numerous decisions of lower federal courts applying federal eminent domain law, including those of the Third, Fifth, and Eighth Circuits.[8]

Of course, states have not all been lockstep in their approach, as the Wisconsin Supreme Court's decision discusses. *See* Pet. App. 24-28 (collecting cases). Thus, in some states, courts have been willing to make exceptions when warranted by particular circumstances. *See, e.g., State ex rel. McCaskill v. Hall*, 28 S.W.2d 80, 82 (Mo. 1930) (under state constitution and city charter, "exceptional circumstances" may permit adding the value of various interests together to exceed the whole). And a handful of state courts have opted not to apply the unit rule, but instead have determined that a separate valuation approach may be more appropriate. *See, e.g., State v. Platte*

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829 (N.J. Super. Ct. Law Div. 1975); *Arlen of Nanuet, Inc. v. State*, 258 N.E.2d 890, 893 (N.Y. 1970); *Hughes v. City of Cincinnati*, 195 N.E.2d 552, 556 (Ohio 1964); *State v. Mehta*, 180 P.3d 1214, 1220 (Okla. 2008); *State Highway Comm'n v. Burk*, 265 P.2d 783, 798-800 (Or. 1954); *City of Greenwood v. Psomas*, 155 S.E.2d 310, 313 (S.C. 1967); *Frankfurt v. Texas Turnpike Authority*, 311 S.W.2d 261, 267 (Tex. Ct. App. 1958); *State v. Brown*, 531 P.2d 1294, 1295 (Utah 1975); *State v. Cooper*, 162 S.E.2d 281, 284-285 (W.Va. 1968).

[8] *See, e.g., United States v. 6.45 Acres of Land*, 409 F.3d 139, 141, 147-149 (3rd Cir. 2005) (holding that lower court should not have "strayed" from the unit rule); *United States v. 131.68 Acres of Land*, 695 F.2d 872, 875 (5th Cir. 1983) (district court correctly applied the unit rule to valuing sugar cane crop); *Nebraska v. United States*, 164 F.2d 866, 868 (8th Cir. 1947) ("general rule of compensation . . . under the Fifth Amendment for the taking of property in fee simple ordinarily is the fair market value . . . of the property . . . irrespective of the number and kinds of interests existing in it").

Valley Public Power & Irr. Dist. 43 N.W.2d 300, 307-308 (Neb. 1946) (holding that state constitutional requirement that property "taken or damaged" receive just compensation supports separate valuation of each property interest); *Wilson v. Fleming*, 31 N.W. 2d 393, 402 (Iowa 1948) (the "opinion [of *State v. Platte*] appeals to us and we are disposed to follow it especially in view of our own decisions"); *Garella v. Redevelopment Authority*, 196 A.2d 344, 348 (Pa. 1964) ("The 1937 statute adopted neither the 'unencumbered fee' nor the 'aggregate of interests' theory"; process must "fix the total amount of damages [and] apportion").

But in none of these decisions has the state court suggested that it is the United States Constitution causing it to deviate from the unit rule. Where state courts have decided to make exceptions to the unit rule or not apply it at all, courts have explained that such a decision is preferred as more in keeping with their own statutes or state constitutions. *See, e.g., City of Baltimore v. Latrobe*, 61 A. 203, 205-206 (Md. 1905) (noting state's "peculiar" ground rent situation, referring to the "State Constitution", and implying that valuation of separate interests independently in exceptional circumstances comes from "State Constitution"); *Arkansas State Highway Comm'n v. Fox*, 322 S.W.2d 81, 82-84 (Ark. 1959) (holding "axiom that whole cannot exceed the parts" was "inapplicable here" in context of state just compensation where property was taken or damaged); *State Highway Dep't v. Thomas*, 154 S.E.2d 812, 816 (Ga. Ct. App. 1967) (state constitution requires that separate interests be valued and total compensation may exceed the whole). *See also United States v. Seagren*, 50 F.2d 333, 334 (D.C. 1931) (permitting tenant to

obtain award for trade fixtures where tenant protected itself with "private stipulation" in lease).

Any such differing minority approaches do not render use of the "unit rule" constitutionally infirm. In the state where an eminent domain proceeding occurs, there is no lack of certainty about the rule that applies in that state. And even where there is a disparity among the valuation of interests, valuation under the unit rule has not been held to be unconstitutional. In short, there is no need for this Court to step in, and any such entry by the Court would not have the benefit of differing federal constitutional analyses in the lower courts.

In the end, all petitioner has shown is that there are variations among the states in the use of the unit rule as a matter of state law. This is, of course, exactly what one would expect to find in a federal system. Petitioner's claim that variations in state constitutional law present a "conflict"[9] warranting intervention by this Court as a matter of federal constitutional law would obliterate the distinction between state and federal constitutional law, very much impoverishing our federal system.

III. THE DECISION BELOW IS CORRECT AND DOES NOT PRESENT AN IMPORTANT LEGAL ISSUE WARRANTING THIS COURT'S REVIEW.

The absence of any conflict in the lower courts is not the only reason that further review is unwar-

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[9] Brief of Amicus Curiae Institute for Justice also weighs in with what it seeks to portray as a "split" in the application of the undivided fee rule or the unit rule. Like petitioner, amicus fails to demonstrate a conflict of federal constitutional law, and thus it adds nothing that warrants this Court's intervention.

ranted. In addition, petitioner can demonstrate no error in the Wisconsin Supreme Court's decision, and it has set forth no appropriate federal rule that would serve as an alternative to the rule applied by the Wisconsin Supreme Court in the decision below.

A. The essential law in Wisconsin is worth restating. The statutes and cases require that a *freehold* be valued according to its "gross value as a single entity as if there were but one owner." *Green Bay Broadcasting Co.*, 116 Wis. 2d at 12, 342 N.W.2d at 33. As explained in *Walgreens Co. v. City of Madison*, 2008 WI 80, ¶ 44, 311 Wis. 2d 158, 752 N.W.2d 687, "leases are encumbrances upon a property's bundl[e] of rights, not part of the bundle itself." In these circumstances, the value, in appropriate cases, may "reflect the value of an unexpired lease terminated by the condemnation," but "contracts between the owners of different interests in the land should not be permitted to result in a total sum which is in excess of the whole value of the undivided fee." *Green Bay Broadcasting Co.*, 116 Wis. 2d at 11, 13, 342 N.W.2d at 32, 33.

Petitioner's challenge rests on the incorrect claim that the unit rule under Wisconsin law (and that of other states) "ignore[s] property interests." Petition at 4, 5.[10] That is not true. When "property that is held in partial estates by multiple owners is condemned, the condemnor pays the fair market value of an undivided interest in the property." Pet. App. 4. In those circumstances, "[a]pportionment of the total

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[10] This, too, is the crux of the Brief of Amici Curiae National Association of Home Builders and Wisconsin Builders Association. Their brief adds nothing further to petitioner's challenge, which is rebutted herein.

sum awarded is then made among the owners." Pet. App. 5. *Compare* Wis. Stat. § 32 (outlining apportionment process between a property owner and a tenant or those with other ownership interests).[11]

The unit rule nearly always works to the advantage of property owners. Where the value of the property can be enhanced by entering into leases or other divisions of ownership, the unit rule takes this into account by valuing the property in its highest and best use prior to condemnation. In contrast, where owners have depressed the value of their property by entering into divisions of ownership that

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[11] It is not the case, as petitioner claims (Pet. 27), that the unit rule "violate[s] due process" when it limits the evidence that can be introduced to a jury determining fair market valuation. Once the lower courts here decided that the unit rule was the applicable rule, petitioner did not have a due process right to a jury hearing to prove the value of the lease as something separate and distinct from the fee, since this was legally irrelevant. *Compare Heckler v. Campbell*, 461 U.S. 458, 461-462, 467 (1983) (Secretary in disability cases, consistently with requirements of due process, may forgo evidence such as testimony from vocational experts where vocational guidelines available); *Gwathmey v. United States*, 215 F.2d 148, 156-157 (5th Cir. 1954) (court invalidates valuation proceeding where hundreds of tracts sought to be valued and evidence presented, without protections, "overwhelmed" jurors); *see generally Santosky v. Kramer*, 455 U.S. 745, 776 n. 4 (1982) (recognizing the "flexibility" in due process requirements and the value added by procedural protections such as evidentiary rules).

By contrast, it is in the *apportionment* process that the lessee may introduce evidence about the value of its lease. Here, petitioner did provide some evidence to that effect in the proceeding before the Condemnation Commission. However, because the jury in this case found that the fair market value of the property was $0, there was no subsequent apportionment proceeding and thus provision of evidence of the value of the leasehold was moot.

would make the property more difficult to sell, thereby reducing its value, the unit rule *ignores* these divisions, and values the property as if it were an undivided fee.

The unit rule resulted in no compensation for petitioner in this case only because Wisconsin, like other states, does not seek to recover the value that an owner obtains when the government condemns property having a negative value.[12] A simple thought experiment shows why this is so. Suppose that shortly before the condemnation, the Maharishi Vedic University had made a gift of the Building to petitioner. Petitioner's lease would merge into the fee. If the Building were condemned, and the jury determined that it had a fair market value of $0, could it be maintained that petitioner was entitled to some positive compensation for the value of the space that it had previously leased in the Building? Clearly not. Five thousand two hundred fifty feet of space on the ground floor of an eleven-story Building cannot be worth more than the entire Building.

As the Wisconsin Supreme Court recognized, the source of protection for a party in the position of petitioner is the law of contract. Petitioner had the opportunity to protect itself against the complained-of eventuality by negotiating a condemnation clause

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[12] Petitioner sets a value of its leasehold as one exceeding $1 million. Pet. 3. However, the record suggests that this was the amount that petitioner would need to buy and own (not lease) new land elsewhere and to construct on that land an entirely new building for its use, Pet. App. 13-14 & n.10, which is not an appropriate measure of fair market value. What is more, query whether a leasehold in an otherwise vacant building that has been declared unfit for human habitation would be worth over $1 million.

that would have protected its below-market lease in the event of a condemnation. It did not do so. As the Wisconsin Supreme Court observed, "[a] condemnation proceeding cannot be used in these circumstances to recover damages that could have been determined by contract between the parties." Pet. App. 40.

Alternatively, petitioner could have availed itself of potential remedies for breach of contract or restitution. For example, petitioner could have asserted a breach of Section C(4) of the lease, which provides that "[t]he building shall comply with all local and State laws, regulations and codes." Resp. App. 4a. Under the terms of that section, petitioner could have expected the owner, Maharishi Vedic University, to maintain a building consistent with the building code and could have sought a remedy in state court when that was not done. Arguably, as well, petitioner could have brought a claim for restitution against Maharishi Vedic University. This owner received a benefit when respondent condemned its vacant and uninhabitable Building and incurred the necessary expense for asbestos removal to prepare the Building for demolition. This windfall arguably came at the expense of petitioner, and gave rise to a cause of action by petitioner against the Maharishi Vedic University for restitution. *See* Restatement (Third) of Restitution and Unjust Enrichment § 1 (Discussion Draft March 31, 2000) ("A person who is unjustly enriched at the expense of another is liable in restitution to the other.").

Inexplicably, petitioner pursued neither remedy. Instead, petitioner brought suit against the various owners of the Building based on allegations about a clause in the lease that did not exist. *See* Pet. App.

37-39. The suit was dismissed as frivolous. *City of Milwaukee Post No. 2874 VFW v. Redevelopment Authority of Milwaukee*, 2007 WI App. 130, ¶¶ 37-38, 731 N.W.2d 383 (unpublished opinion). The Wisconsin Court of Appeals noted that petitioner had quoted the relevant section of the lease (Section C(4)) in its brief on appeal, but had advanced no argument based on this provision.

Where a contracting party, such as petitioner, has failed to protect its interests by negotiating appropriate lease protections or properly enforcing its common law rights, it should not be allowed to argue that it is entitled to an exception to an established state rule of law, such as the unit rule. Before the Wisconsin Supreme Court, "[petitioner] contend[ed] that this Court must make an exception to the unit rule in the present case in order to avoid a grossly unjust rule." Pet. App. 23. The Wisconsin Supreme Court rejected that argument because petitioner had failed to avail itself of its contractual remedies. This determination, grounded in the application of state law to the peculiar circumstances of this case, was fully warranted.

B. Petitioner also fails to articulate a federal constitutional rule that it would have this Court adopt in order to overturn Wisconsin law and reverse the judgment below. Petitioner does not argue that the unit rule should be discarded in favor of an approach that would require separate valuation of each individual property interest. This has been rejected as administratively burdensome and the generator of great uncertainty by the vast majority of jurisdictions and commentators who have considered the issue.

At times, petitioner appears to claim that federal law requires that Wisconsin recognize "exceptions" to

the unit rule. Whether required or not, Wisconsin does. As the Wisconsin Supreme Court explained in its opinion, "[d]eparture from the unit rule may be made in rare and exceptional circumstances." Pet. App. 30. The Wisconsin Supreme Court recognized that such an exception may be found in other cases, but not in this case. *Id.* In a careful and judicious decision, the Wisconsin Supreme Court considered petitioner's plea for an exception, and determined that it was not appropriate in this case, given the protection that the unit rule provided for the public and the private interests involved and the court's conclusion that the no-compensation result was the product of a poorly drafted lease and petitioner's ineffectual pursuit of a breach-of-contract claim against the fee-owner. *See* Pet. App. 30-40.

What the petition boils down to is a demand that this Court countermand the Wisconsin Supreme Court's careful review of the record, and require as a matter of federal constitutional law that respondent pay some compensation for condemning a lease in an uninhabitable building. This Court does not ordinarily sit to decide whether state courts have correctly granted or denied an exception to state law in highly idiosyncratic circumstances, and it should not do so here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

V.F.W. LEASE

THIS INDENTURE, entered into and executed in duplicate, this 28th day of November, 1962, by and between the City of Milwaukee Post No. 2874, Veterans of Foreign Wars of the U.S., a Wisconsin corporation, hereinafter referred to as the Post, and Towne Metropolitan, Inc., a Wisconsin corporation, hereinafter referred to as the Corporation.

The Corporation is possessed of fee title to a parcel of land situated in the City and County of Milwaukee, State of Wisconsin, legally described as follows:

> Part of Lot One (1), Block Two (2) in Assessment Subdivision No. 40, being a Subdivision of Blocks One (1), Two (2), Three (3), Four (4) and Six (6) of Cross and Ludington's Addition (now vacated) in the South West One-quarter (1/4) of Section Thirty (30), in Township Seven (7) North, Range Twenty-two (22) East, in the City of Milwaukee, which is bounded and described as follows, to wit:
>
> Commencing at the North East corner of said Lot 1, running thence West along the North boundary of said Lot 1, which North boundary is coincident with the South line of West Wisconsin Avenue, 153.32 feet to a point, in the West line of said Lot 1, running thence South along the West line of said Lot 1, 159.12 feet to a point; running thence East along a line parallel to the North boundary line of said Lot 1, 48.55 feet to a point; running thence North along a line parallel to the East boundary of said Lot, 9.12 feet to a point; thence East along a line parallel to the North line of said Lot. 134.77 feet to a point, thence

North along the East line of said Lot, 150 feet to the point of commencement,

together with all rights of way, easements, driveways and pavement, curb and streetfront privileges thereunder belonging.

which real estate was conveyed to the Corporation by the Post in consideration of the Corporation's agreement to provide the Post with new quarters of approximately 5250 square feet constructed as part of the hotel building now under construction on such real estate, and the Post, in consideration of the covenants and agreements on the part of the Corporation hereinafter set forth, agrees that this lease shall be substituted for and shall take the place of the original lease dated June 1, 1961 between the Post and the Corporation affecting such real estate, which original lease is hereby absolutely terminated and superseded.

The Corporation, in consideration of the above mentioned conveyance from the Post and in consideration of the substitution of this lease for the aforesaid original lease, does covenant and agree as follows:

A

The Corporation hereby demises and leases unto the Post a certain portion of the above described parcel of real estate, totalling approximately 5250 square feet, for a period of Ninety Nine (99) years, at a rental of one ($1.00) Dollar per year, and hereby grants to said Post an option to extend this lease on the same terms and conditions for another term of 99 years. This lease shall commence upon completion of the new quarters for the Post, in accordance with the terms and conditions hereinafter set forth, but, in no event shall commencement of said leasehold occur

later than September 1, 1963 and the Post premises shall be ready for occupancy on or before that date.

B

The Corporation shall, at its own expense, complete the hotel building now under construction on said real estate and shall provide the Post with an area of approximately 5250 square feet separated from any other portions of building or buildings by solid wall and which shall conform in every respect with the plans and specifications attached hereto as Exhibit A and incorporated herein by reference (hereinafter called the "Plans and Specifications").

C

The following requirements of the post concerning the location, construction, fixtures and equipment of the Post premises, as more particularly shown in the Plans and Specifications shall not be changed without the Post's consent and shall be provided by the Corporation at its sole expense:

(1) The Post premises shall consist of a minimum of 5250 square feet;

(2) The Post premises shall have an entrance lobby on Wisconsin Avenue which will conform and blend with other portions of the building fronting or abutting on Wisconsin Avenue; this area shall be in addition to the 5250 square feet heretofore mentioned;

(3) There shall be installed a properly discernible pole for our National Flag, a suitable, attractive VFW plaque at the Wisconsin Avenue entrance, a suitable Post name sign and appropriate markings on Wisconsin Avenue

and 26th Street, to provide clear public identification of the Post premises;

(4) The building shall comply with all local and State laws, regulations and codes;

(5) A minimum of 3000 square feet of the Post premises will be provided as meeting hall space, with such space to be so constructed that it can be divided into two (2) separate meeting halls, properly lighted. Such meeting hall space shall have a free-spanned acoustical ceiling and the movable partition between the two halls shall be of soundproof construction and material;

(6) All other areas of the Post premise will have acoustical ceilings and will be properly lighted;

(7) The walls, lobby, bar, bar partition and hallway to meeting rooms shall be of hardwood veneer construction, and all others shall be per the Plans and Specifications;

(8) A second entrance to the Post premises will be provided as shown on the Plans and Specifications;

(9) The Post premises will include space completely partitioned for checkroom, lavatory facilities, closet space and storage space, as shown by the Plans and Specifications;

(10) A barroom equipped with a twenty five (25) stool bar, the original 25 stools and refrigerated back bar and walk-in cooler, a kitchen equipped with sinks, refrigerator, stove, formica top work area, cabinets and serving doors opening to the meeting hall and full

heating and air conditioning equipment shall be provided per the Plans and Specifications.

D

As further consideration, the Corporation covenants and agrees as follows:

(1) Post members and their guests may use up to twenty (20) parking spaces in the building parking area at any time. The Corporation may at its option specially mark and designate the spaces to be used by the Post;

(2) The Corporation shall pay any and all real estate taxes on all of the real estate and improvements thereon, commencing June 1, 1961 and continuing through the leasehold term;

(3) The corporation shall furnish and provide all of the heat and air conditioning required by the Post at no expense to the Post. All other electric, telephone, gas, water and other utilities used by the Post shall be paid for by the Post;

(4) The Corporation shall properly repair and maintain the Post premises and fixtures as needed, and shall redecorate the interior at least every seven (7) years;

(5) The Corporation shall replace all major items of equipment furnished by the Corporation (excluding the refrigeration unit of the walk-in cooler) as said equipment requires replacement through normal fair wear and tear.

E

This lease shall be subject and subordinate to any mortgages from time to time placed upon the building and real estate herein described and premises hereby demised and the Post shall, upon the Corporation's request, evidence such subordination of its interest hereunder by executing and delivering such further instrument or instruments evidencing such subordination as may be reasonably required by any mortgagee or mortgagees. It shall be a condition of any subordination hereunder that the mortgagee or mortgagees shall agree that any notices of default required to be given under such mortgage or mortgages to the Corporation as mortgagor, shall also be given to the Post and the Post may perform such mortgage or, as provided in any required notice, cure any defaults by the mortgagor thereunder, and if the Post shall so perform or such default be timely cured by the Post the same shall be deemed to have been performed or cured for all purposes of such mortgage and the Post shall be subrogated in such event to the rights of the mortgagor thereunder. This lease, or a memorandum hereof containing this paragraph in full, shall be recorded as notice of the Post's rights hereunder and interest in the premises hereby demised. It being understood by both parties that the leasehold interest of the Post is and always shall be a vested property right.

F

The Post shall use the Post premises solely for the purposes of its organization and other veteran activities and shall restrict the use of such premises to its members and their invitees, and the same shall not be open to the general public.

G

It is mutually agreed and understood that wherever in this agreement reference is made to approval, or acceptance, or agreement of the Post, that reference is being made to the duly authorized Committee of the Post, to wit: Post Commander, Chairman of the Executive Committee and the Attorney for the Post. It is further mutually agreed and understood by both parties that wherever approval, acceptance or consent is required it shall not be unreasonably withheld

H

It is further mutually understood and agreed that the provisions of this instrument shall inure to the benefit of and be binding upon the parties hereto, their respective successors and assigns, provided however that without the prior written consent of the Corporation (1) the Post shall not sublet any part of the premises leased by it hereunder and (2) the Post's interest as lessee hereunder shall not be the subject of assignment or succession except either to a successor VFW Post or to a comparable veterans' organization which has succeeded to the Post's function either voluntarily or by operation of law. In the event the Post shall cease to exist or shall cease to occupy and operate the Post premises and no comparable veterans' organization shall succeed to its function and assume this lease, all of the Post's rights and privilege hereunder and its interest as lessee herein shall revert to the Corporation.

IN WITNESS WHEREOF, the Post and the Corporation have both duly executed this lease and affixed their respective seals hereto, all being done on the day and year first above written.

AND IN FURTHER WITNESS WHEREOF, the Post has caused these presents to be signed by its Commander, its Agent and Attorney in Fact thereunto authorized and also its Quartermaster who also is its Agent and Attorney In Fact; both such Commander and Quartermaster represent and warrant that they have been given specific authority and direction to execute this lease, and the Corporation has caused these presents to be signed by its President and Secretary thereunto duly authorized, all on the day and date first before written.

In Presence of

CITY OF MILWAUKEE POST NO. 2874, VETERANS OF FOREIGN WARS OF THE U.S.

/s/ Illegible

/s/ John R. Cary
Post Commander

/s/ Illegible

/s/ Harold Hutchinson
Post Quartermaster

TOWNE METROPOLITAN, INC

/s/ Illegible

/s/ Joseph J. Zilber
President

/s/ Illegible

/s/ Illegible
Secretary

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Personally appeared before me this 28th day of November, 1962, the above named John R. Cary and Harold Hutchinson to me known to be the Post Commander and Post Quartermaster of the City of Milwaukee Post No. 2874, Veterans of Foreign Wars

of the U.S., hereinbefore referred to as the Post, and to me known to be the persons who executed the foregoing instrument and acknowledged the same as their free act and deed.

/s/ [Illegible]
Notary Public, Milwaukee County, Wisconsin
My commission expires 4-5-65

STATE OF WISCONSIN)
) ss.
MILWAUKEE COUNTY)

Personally came before me, this 28th day of November 1962, Joseph J. Zilber President, and [Illegible], Secretary of the above named Corporation, TOWNE METROPOLITAN, INC. to me known to be such President and Secretary of said Corporation, and acknowledged that they executed the foregoing instrument as such officers as the deed of such corporation, by its authority.

/s/ [Illegible]
Notary Public, Milwaukee County, Wisconsin
My commission expires 4-5-65